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January 3, 1963
Opinion No. 52-330
ARIZONA ATTORNEY GENERAL

Mr. W. W. Lane
State Land Commissioner
Capitol Annex
Phoenix, Arizona

Mr. Bryant W. Jones
Attorney for Arizona Underground
Water Commission
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P. O. Box 70
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Gentlemen:

We acknowledge receipt of letters from Mr. Lane and Mr. Jones. As the letters request our opinion as to statutes affecting underground water, we are answering both with one letter.

Mr. Lane's letter, which we will refer to as "Request No. 1", reads as follows:

"I wish to make a request for your opinion with respect to the issuance of a permit for the replacement of a well which was drilled after June 24, 1948 but prior to the time the area in which the well is located was declared to be a critical area.

I refer to your opinions of June 4th, September 16th and October 15th of this year with respect to the issuance of permits for the drilling of irrigation wells. Your opinions of June 4th and October 15th read in part as follows:

52-330

Mr. W. W. Lane
Mr. Bryant W. Jones

Page two
January 3, 1953

'It is therefore our opinion that a replacement well may be drilled provided it is to replace a well which was in existence and from which water was being pumped for irrigation purposes in June of 1948 for the purpose of producing the amount of water which was being produced by the old well in June of 1948.'

The question has been raised with us whether, under the replacement well provision of the 1948 Code, and as it may be affected by the Act of 1952 respecting ground water, if a well is legally drilled and put into operation and then goes bad, a replacement cannot be granted for such well in the same manner as those put in prior to 1948.

I will thank you to advise us with respect to this."

Mr. Jones' letter, which we will refer to as "Request No. 2", reads as follows:

"The Underground Water Commission has had a request from Mr. Charles D. McCarty, of the firm McCarty & Chandler of Tucson, for a clarification of a section of Chap. 49, Senate Bill No. 56, Twentieth Legislature, Second Regular Session, in the form of an opinion from your office.

I have been requested by the Executive Secretary of the Commission to obtain an opinion from your office in accordance with this request. Section No. 3, provides as follows:

'New wells in critical areas. In any area, now or hereafter declared critical under the provisions of the groundwater code of 1948, no water shall

be pumped for irrigation purposes from any well the drilling of which has not been completed prior to the effective date of this Act. This section shall not be construed to prohibit the construction of or pumping from, a well authorized under an amended permit issued pursuant to the provisions of Section 9, Chapter 5, eighteenth legislature, sixth special session.'

Mr. McCarty raises the question that according to this section no water may be pumped from any well, the drilling of which has not been completed by March 7, 1952, if the area in which such well is drilled is at any time in the future declared critical. He mentions the exception contained in Section 3, and makes the following comment:

'It seems to us that a little interpretation of this law would simply stop the development of all new land in the state because of the threat that the area in which new wells were drilled would thereafter be declared critical. In this connection, the exception made would seem to be arbitrary and unjustly discriminatory. We believe that an authoritative interpretation of the Section is urgently required.'

May we have an opinion on the interpretation of Section 3 of Senate Bill No. 56?

"Request No. 1"

Our opinions of June 4 and October 15, 1952, were confined to replacement of wells actually in use in June 1948 (date Groundwater Code of 1948 became effective as a law), and we did not intend to hold that only

wells in existence in June 1948 could be replaced.

The Legislature, in declaring its policy in adopting the Groundwater Code of 1948, stated in part as follows:

" * * * It is therefore declared to be the public policy of the state, in the interest of the agricultural stability, general economy and welfare of the state and its citizens to conserve and protect the water resources of the state from destruction, and for that purpose to provide reasonable regulations for the designation and establishment of such critical groundwater areas as may now or hereafter exist within the state."
(Section 75-147, Arizona Code, 1939, as amended)

The Code defines a "critical groundwater area" as:

" * * * any groundwater basin as here-in defined, or any designated subdivision thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal." (Section 75-146 ACA, as amended)

A "Groundwater basin" is defined as:

" * * * land overlying, as nearly as may be determined by known facts, a distinct body of ground water, but the exterior limits of a groundwater basin shall not be deemed to extend upstream or downstream beyond a defile, gorge or canyon of a surface stream or wash." (Section 75-146, ACA 1939, as amended)

A "Groundwater subdivision" is:

" * * * an area of land overlying, as nearly as may be determined by known facts, a distinct body of ground water; it may consist of any determinable part of a groundwater basin." (Section 75-146, ACA 1939, as amended)

Section 75-149 authorizes the State Land Commissioner to designate groundwater basins and subdivisions thereof (not critical" areas), and gives him access to the land, but expressly provides that the section "shall not be construed as giving the Commission authority to regulate the drilling or operation of wells in such groundwater basin or subdivision." (Emphasis supplied)

Under a different section of the Code (75-150) the Commissioner may, after published notice, hearing, findings of fact, filing map, etc., designate and establish a critical groundwater area. Section 75-151 provides that irrigation wells may not be drilled in critical areas without permit from the Commissioner.

It is our opinion that the Groundwater Code of 1948 gives the State Land Commissioner no jurisdiction whatever over irrigation wells in "non-critical" areas - his jurisdiction and authority over wells becomes effective only upon and after the area in which such wells are situated has been designated as "critical".

Therefore, it is our opinion that when the Legislature, in Section 75-150, provided that nothing in the Groundwater Code of 1948 shall be construed "to effect the right of any person to continue the use of water from existing irrigation wells or any replacements of such wells" it meant wells in existence and use for irrigation purposes at the time the area in which they are situated was designated as "critical".

Answering "Request No. 1", it is our opinion that if a well is drilled in a "non-critical" area after the date the Groundwater Code of 1948 became effective as a law and such well was operating and used for the purpose of irrigating land at the time the area in which it is situated was designated "critical", such well may be replaced if it goes bad.

"Request No. 2"

Mr. W. W. Lane
Mr. Bryant W. Jones

Page six
January 3, 1953

It is our opinion that Paragraph 3, Chapter 49, Laws of 1952, quoted in "Request No. 2", should be interpreted and construed in the same manner as we have the 1948 Act. If possible, a statute should be construed to preserve its constitutionality and validity. As we have said in our opinions of June 4 and October 15, 1952, the 1948 and 1952 laws should be construed together so as to give effect and validity to both Acts.

Under neither the 1948 nor 1952 statute has the State Land Commissioner jurisdiction over irrigation wells in "non-critical" areas. His authority and jurisdiction becomes effective only upon and after an area has been designated as "critical".

Under both Acts a person may construct irrigation wells and irrigate and cultivate lands therefrom in all areas except those theretofore designated "critical". To construe the statute as authorizing the Commissioner to prohibit the pumping of water from such wells just because the area is thereafter designated as "critical" would certainly be courting a finding of unconstitutionality and invalidity by a court.

It is our opinion that wells in existence and bona fide use as irrigation wells at the time an area is designated "critical" are lawful, and the owner is entitled to continue the use of the same in the same manner as provided in Section 75-160.

Hoping this answers your inquiries, we are

Very truly yours,

FRED O. WILSON
Attorney General

ALEXANDER B. BAKER
Assistant Attorney General

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